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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 792.

THE UNITED STATES, APPELLANT,

vs.

J. K. McLEAN.

APPEAL FROM THE COURT OF CLAIMS.

Dec 12 1877

FILED OCTOBER 3, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 792.

THE UNITED STATES, APPELLANT,

vs.

J. K. McLEAN.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims, December term, 1872.

J. K. McLEAN
vs.
THE UNITED STATES. } No. 7891.

I. *Petition.—Filed July* 28, 1873.

The petition of J. K. McLean, a citizen of the United States, respectfully represents:

That the Postmaster-General appointed and commissioned petitioner as postmaster at Florence, county of Marion, State of Kansas, on or about the 14th day of April, 1871, and accepted and approved a bond executed by petitioner, with sureties, conditioned that petitioner should faithfully perform the duties of said office, or in default thereof pay to the United States a large sum of money.

That petitioner entered upon and discharged all of the duties and performed fully and faithfully all of the obligations of the said office, from the 14th day of April, 1871, to the first day of July, 1872.

That the revenues returned from said office to the Post-Office Department, and the service performed at said office previous to, during, and subsequent to said period entitled petitioner, under the statutes prescribing the basis for compensation, adjustment, and re-adjustment of salaries of postmasters, to be paid for said service during said period the sum of five hundred and seventy-eight dollars.

That in lieu of said sum the Postmaster-General has caused to be paid to petitioner the sum of eight dollars and fifty cents, and no
2 more, and has refused to adjust the salary and allowances of said office covering said period, in conformity to law, and has refused to pay petitioner the sum of five hundred and sixty-nine dollars and fifty cents, which is justly due him for said service.

Your petitioner further shows that he has at all times borne true allegiance to the United States Government, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government, and he prays judgment of this honorable court for the said sum of five hundred and sixty-nine dollars and fifty cents, and for such other and further relief as the nature of the case may seem to require.

HARVEY SPALDING,
Attorney for Claimant.

Harvey Spalding, being duly sworn, deposeth that he is the attorney for the claimant in the foregoing petition; that no assignment or transfer of said claim, or any part thereof or any interest therein, has been made, except as in said petition is stated; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

HARVEY SPALDING.

Sworn to and subscribed before me this 28th day of July, A. D. 1873.
[SEAL.] CHARLES E. WEAVER,
Notary Public.

Address of claimant: Florence, Marion Co., Kansas.
Claimant's solicitor: C. F. Peck, Washington, D. C.

3 II. *Argument and submission of the case.*

At a Court of Claims held at the Capitol in the city of Washington on the 16th day of March, A. D. 1875.

* * * * * * *
* * * * * * *

J. K. McLean vs. The United States. No. 7801.

These cases were argued by M'r Spalding for the claimant, and M'r McCammon for the defendants, and thereupon submitted.

NOTE BY THE CLERK.—The defendants filed no traverse in this case.—J. R.

4 III. *Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court upon the evidence finds the facts to be as follows:

I. The claimant was, by the Postmaster-General, appointed postmaster at Florence, Marion County, State of Kansas, on the 13th of March, 1871, and he entered upon the duties of his office on the 14th of April, 1871.

II. His appointment was announced to him in a letter in the following form, with the blanks properly filled up for that purpose:

(Form 6 a.)

"POST-OFFICE DEPARTMENT,
"APPOINTMENT-OFFICE,
, 187 .

"SIR: Accompanying this you will receive a letter of appointment as postmaster at . The salary to which you will be entitled, and which you will be allowed to retain out of the proceeds of your office, has been fixed at the sum of $ per annum, until it can be ascertained what the amount of business will be.

"You will, therefore, at the end of each quarter, make and forward to the Third Assistant Postmaster-General a statement, under oath, of the total value of postage-stamps canceled during the quarter. Under the present regulations you are not required to keep a regular account of mails sent and received as heretofore, except only of unpaid mail-matter; but informal memoranda, made day by day, of mails sent from your office prepaid by stamps will enable you to make the required quarterly statement.

"Your salary cannot exceed the amount to which the office would be entitled from commissions and box-rents under the former law, but will be re-adjusted at the proper time by the Postmaster-General, on the basis of the amount of business done, as shown by the quarterly statements above required.

"I am, respectfully, &c.,

"*First Assistant Postmaster-General.*

"To , Esq."

5 III. In the letter so sent the annual salary of the claimant until it could be ascertained what the amount of the business of the office would be, was fixed at seven dollars.

IV. On the 1st of June, 1871, the following letter was sent by the First Assistant Postmaster-General to the claimant:

"POST-OFFICE DEPARTMENT,
"APPOINTMENT-OFFICE,
" *Washington, June* 1, 1871.

"SIR: To enable the Postmaster-General to review and re-adjust your salary from and after the first day of July, 1872, upon a proper basis, as required by the act approved July 1, 1864, you are hereby required to keep an account of the total amount of stamps canceled at your office for the six months beginning July 1, 1871, and ending December 31, 1871; also, the amount collected on unpaid letters, on newspapers, and other printed matter, and for box-rents during the same period.

"You are hereby instructed to make out on the first of January, 1872, and forward immediately thereafter, to this office, a sworn statement of the amounts arising from each of the above-named sources.

"A blank form for this purpose is sent herewith. Your prompt and faithful compliance with this order is required, and you will be held to account for neglect thereof.

"I am, respectfully, &c.,

"J. W. MARSHALL,
"*First Ass't P. M. General.*"

☞ This order should be kept in a conspicuous place, and in the event of a change of postmaster, the attention of your successor must be called to it, and the account kept by you turned over to him.

V. On the 18th of September, 1871, the claimant transmitted to the Third Assistent Postmaster-General a letter of which the following is a copy:

"FLORENCE, KANSAS, *Sept.* 18, 1871.

"To the Hon. Third Ass't P. M. General:

"DEAR SIR: I respectfully beg leave to address you a statement of the labor of this (Florence office) and call your attention of the adequacy of the pay for the same. I have received notice the office would be rated January 1st, 1872, but feeling unable to devote so much of my time and labor as the office requires for the present, to January 1st, 1872, (which is seven dollars a year,) that I ask your consideration of this statement. I take the record of the month of August alone; I receive and dispatch mails east, west, and south each six times a week, and north three times a week. The southern mail by El Dorado will weigh from 25 lbs. to 400 lbs., the eastern about half the southern; the west and the north is contained in one sack each. We have to distribute the southern and northern mails. We have cancelled for the month of August, $68.45; mailed 51 free letters, 412 papers; mailed 9 registered packages, delivered five, and recei'ted and made record of 196 registered packages in transit.

"I have fitted up an office at a cost of more than $100, which will compare favorably with any office of third class. I have 34 lock-boxes and 143 glass-front boxes, which we rent for 25 and 50 c'ts per box per quarter, of which more than one-half are already taken.

"Yours, &c.,

"J. K. McLEAN,
P. M. Florence, Kansas."

6 VI. Revenue of the said post-office from April 14, 1871, to July 1, 1871, was $161.12, and the salary paid to the claimant for that period was one dollar and forty-eight cents.

VII. The revenue of said office from July 1, 1871, to January 1, 1872,

was $482.69, and the salary paid to the claimant for that period was three dollars and fifty cents.

VIII. The revenue of said office from January 1, 1872, to July 1, 1872, was $504.39, and the salary paid to the claimant for that period was three dollars and fifty cents.

IX. On the 1st of January, 1872, the claimant transmitted to the Postmaster-General a sworn statement of the revenue of said office, as required in the letter set forth in Finding IV, showing said revenue for the period July 1, 1871, to January 1, 1872, to have been $482.67, as stated in Finding VII.

X. The Postmaster-General, at the regular biennial re-adjustment of salaries of postmasters on the 1st of June, 1872, re-adjusted the salary of the claimant on the basis of said statement, and fixed the same at $560 a year from the 1st of July, 1872.

XI. From April 14, 1871, till July 1, 1872, no other application
7 was made by the claimant to the Postmaster-General for a re-adjustment of his salary than that stated in Finding V.

XII. On the 14th of October, 1872, H. Spalding, claiming to be the attorney of the claimant, addressed a letter to the First Assistant Postmaster-General, requesting that the order fixing the claimant's salary at $560 per annum from July 1, 1872, should be so modified as to fix it at that sum from the commencement of his service. This letter not being accompanied by a sworn statement of the operations of the post-office at Florence for the six months preceding, as required by regulations of the Post-Office Department, and being not from the postmaster himself but from an attorney, and the Assistant Attorney-General for the Post-Office Department having given it as his opinion to the Postmaster-General that in law the application for a re-adjustment of the salary of a postmaster must be made directly by the postmaster, and could not properly be made through an attorney, the Postmaster-General declined to consider M'r Spalding's letter as an application for a re-adjustment of the claimants salary.

8 And upon the foregoing findings of fact, the Court of Claims, being divided upon the right of the claimant to recover, does, for the purposes of an appeal, decide as conclusions of law—

I. The purpose of the act 12th June, 1866, (14 Stat. L., p. 59, § 8,) was to prescribe rules to govern the action of the Postmaster-General in the cases therein enumerated, and when the quarterly returns of the claimant showed that the salary allowed to him by the Postmaster-General was ten per centum less than it would have been on the basis of the commissions allowed to postmasters under the act 22 June, 1854, (10 Stat. L., p. 298,) then it became the imperative duty of the Post-
9 master-General to review and re-adjust the claimant's salary, to the end that at the beginning of the succeeding quarter he should receive an increased salary, as provided by the act 1st July, 1864. (13 Stat. L., p. 335, § 2.)

II. Although the purpose of the act 12th June, 1866, (14 Stat. L., p. 59, § 8) was to prescribe a rule to govern the action of the Postmaster-General in regard to the salaries of the postmasters of the third, fourth, or fifth class therein referred to, yet nevertheless the court cannot execute any discretion confided by the act 22 June, 1854, (10 Stat. L., p. 289,) to the Postmaster-General, and therefore the claimant's recovery must be limited to the minimum compensation provided in like cases by that statute.

By the court.

10 IV. *Request of claimant for additional findings, and rulings thereon.*

Now comes the said claimant, by his solicitor, Harvey Spalding, and moves the court to find additional facts as follows:

I. The claimant, after his appointment mentioned in Finding I, to wit, on the third day of April, 1871, received from the Postmaster-General a commission in the form following:

"POST-OFFICE DEPARTMENT.

[VIGNETTE.]

"Marshall Jewell, Postmaster-General of the United States of America, to all who shall see these presents, greeting:

"Whereas on the day of , 187 , was appointed postmaster at , in the county of , State of ; and whereas he did, on the day of , 187 , execute a bond, and has taken the oath of office, as required by law:

"Now, know ye that confiding in the integrity, ability, and punctuality of the said , I do commission him a postmaster, authorized to execute the duties of that office at aforesaid, according to the laws of the United States, and the regulations of the Post-Office Department: To hold the said office of postmaster, with all the powers, privileges, and emoluments to the same belonging, during the pleasure of the Postmaster-General of the United States."

II. After the date of his appointment mentioned *mentioned* in Finding I, to wit, on the 27th day of March, 1871, he executed an official bond in the sum of five hundred dollars, with approved sureties, for full and faithful performance of his duties and obligations.

11 III. Subsequently, to wit, on the 27th day of June, 1871, he was required by the Postmaster-Gen'l to execute a new bond in the sum of two thousand dollars, which last-mentioned bond was dated June 27th, 1871, and accepted on the 19th of July, 1871, and was for like purpose.

IV. That the claimant fully complied with, carried out, and performed, during the periods of service mentioned in Findings VI, VII, VIII, all requirements made upon him by special instructions and general regulations made by authority of the Postmaster-General, with reference to a complete, full, and detailed return to the Post-Office Department, on the last day of each quarter, of the entire business and revenues of said office, showing the whole amount of revenues and sources thereof, and that said returns were duly examined and audited by the officer of the Post.Office Department by whom the said regulations required it to be done.

V. That the first mention made of application for re-adjustments of salaries by the Postmaster-General in instructions to postmasters was contained in section number 53 of the Postal Regulations, published after April 5th, 1873.

12 VI. That said regulation is in the following words, viz: "Under the law (section 82) the salaries of postmasters are re-adjusted once in two years, and in special cases as much oftener as the Postmaster-General may deem expedient. Applications for special re-adjustment of salary must be made to the First Assistant Postmaster-General and

must state fully the facts upon which such application is based. The statement thus made will be compared with the quarterly account-current rendered to the Auditor, and, if found to come within the rule prescribed by the law, an order will be made re-adjusting the salary of the post master."

VII. That no other instructions upon the subject of such applications was given by the Postmaster-General previous to January 1, 1874.

VIII. That previous to Jan'y 1, 1874, no cases of postmasters whose business and revenue entitled them to re-adjustment of salaries were excluded from consideration by the Postmaster-General upon grounds such as are set forth in Finding XII.

IX. That the first mention made in the Postal Regulations of a sworn statement of the operations of a post-office for the six months
13 preceding as being necessary for a re-adjustment of salary is that contained in section 200, published after April 5th, 1873, and in the following words, to wit: "The salaries of postmasters are based upon a sworn statement of the operations of their offices for six months, furnished to the First Assistant Postmaster-General; and in adjusting the salary of each office, the whole amount of box-rent reported in this sworn statement is allowed the postmaster as part of his salary. When, therefore, the postmaster fails to make any report or reports a less amount than that included in his salary, he is charged in the adjustment of his quarterly return by the Auditor with the full amount of box-rents included in his quarterly salary." This is the regulation specified by the Postmaster-General as one of the grounds why he did not consider the application made by Harvey Spalding on behalf of claimant on Oct. 14, 1872, which objection is mentioned in Finding XII.

X. That special re-adjustments of postmasters' salaries before the publication of the Postal Regulations made after April 5th, 1873, were
14 neither regulated or controlled by postal regulation other than those specified or referred to in Requests XX & XXI.

XI. That prior to the act of June 8th, 1872, the Postmaster-Gen'l made special re-adjustments of salaries with or without special sworn statements addressed to himself.

XII. When such special re-adjustments were made with such sworn statements, said statements were verified by the official returns to the Auditor for the Post-Office Department.

XIII. That the Postmaster-Gen'l caused adjustments or re-adjustments of salaries at newly-established offices in cases where there was an extraordinary increase, like the oil regions, in mining districts, and prominent points on railroads, where the salary will run up from twelve dollars to several , to be made to conform to the revenue, and to supersede the salary of twelve dollars first assigned, and to have effect at the increased rate from the beginning, this before the passage of the act June 8th, 1872.

15 XIV. That special adjustments or re-adjustments of postmasters' salaries, meaning other adjustments of salaries than regular biennial re-adjustments, were generally based upon the office returns to the Auditor for the Post-Office Department.

XV. That the returns mentioned in Request XIV were required by postal regulations then in force to be made (and were made) on the last day of each quarter.

XVI. These returns were copied into books, in the Auditor's Office, called registers, and were open to the examination of the Postmaster-Gen'l.

XVII. That before claimant brought his suit in the Court of Claims

the Postmaster-Gen'l failed and refused to re-adjust his salary upon and according to the revenues of his office during the period of service mentioned in Findings VI, VII, VIII.

XVIII. That of the revenues mentioned in Finding VII, thirty-nine dollars and ninety-five cents was derived from box-rents, and of the revenues specified in Finding VIII, thirty dollars and twenty-five cents was derived from box-rents, which boxes the claimant fitted up at
16 his own expense, as stated in the letter set forth in Finding V, and as required by postal regulations.

XIX. That the following be substituted for Findings II & III, viz: That at the time the claimant was appointed postmaster at Florence, as stated in Finding I, the post-office of Doyle was transferred one mile to Florence on the Atchison, Topeka & Santa Fé Railroad, and that one J. D. Riggs, before that postmaster at Doyle, resigned at the same time. The salary which was paid J. D. Riggs, postmaster at Doyle, was seven dollars per year, and this salary was also transferred to Florence, and of this the claimant was notified at the time of his appointment.

XX. That the postal regulations in force during the claimant's term of service entitled him to have "all inaccuracies and inadequate or excessive allowances of salary corrected" by timely adjustments and re-adjustments, "upon the basis of all the revenues," box-rents included.

XXI. That the postal regulations in force during the claimant's term of service entitled the claimant to receive, by timely adjustments
17 and re-adjustments on the basis of all the revenues, "as much compensation as he" would have received under the act 1854, fixing compensation of postmasters from commissions and box-rents, "and to receive the benefit of the *of the* revenues from box-rents," as effectually as he could under the system of commissions and emoluments.

XXII. That the Postmaster-Gen'l construed section 4 of the salary act of July 1, 1864, to be limited to post-offices established before July 1st, 1864, and assigned salaries thereat equal to fifty per cent. of the gross revenues.

XXIII. That the nominal salary assigned the claimant at date of his appointment was made by the Postmaster-Gen'l under an authority assumed by him to exist outside of said section four.

HARVEY SPAI DING,
Solicitor for Claimant.

Upon the foregoing requests the court makes the following ruling, to wit:

All the foregoing requests are disallowed, except the fourth and eighteenth, which are allowed.

By the court.

18 V.—*Final judgment.*

At a Court of Claims held at the Capitol in the city of Washington on the 16th day of April, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said J. K. McLean, claimant, do have and recover of and from the United States the sum of five hundred and sixty-nine dollars and fifty cents, ($569.50.)

By the court.

19 VI.—*Application for allowance of appeal and order allowing the same.*

From the judgment rendered in the above-entitled cause on April 16, 1877, in favor of claimant, the defendants, by their Attorney-General, on the 9th day of May, 1877, make application for and give notice of an appeal to the Supreme Court of the United States.

N. D. R. THOMAS SIMONS,
Attorney-General.

Filed May 9, 1877.

Ordered that the appeal be allowed as prayed for.
By the court.
MAY 9, 1877.

20 In the Court of Claims.

J. K. McLEAN
vs.
THE UNITED STATES. } No. 7801.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon, of the application of the Attorney-General for defendants for the allowance of an appeal, as filed in the clerk's office May 9, 1877, and of the order of the Court of Claims allowing the same, of the findings of fact by the court and conclusions of law thereon, and of the request of claimant for additional findings of fact and the ruling thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-seventhday of September, A. D. 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 792. The United States, appellant, *vs.* J. K. McLean. Court of Claims. Filed 3rd October, 1877.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
vs.
J. K. MCLEAN. } No. 792.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
vs.
J. K. MCLEAN. } No. 792.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In this action the appellant claims $569.50 for compensation to him as postmaster at Florence, in Kansas, from the 14th day of April, 1871, to the 1st day of July, 1872.

The court below found that he acted as such postmaster for the time alleged; that he was appointed postmaster at an annual salary of $7, until it could be ascertained what the amount of business of the office would be; that certain steps were taken (June 1, 1871) by the Postmaster-General looking to a readjustment of the salary *after July* 1, 1872; that other steps were taken by the claimant, by attorney, pressing an earlier read-

justment; that the Postmaster-General declined to consider such application for readjustment, on the ground that he was advised by the Assistant Attorney-General for his Department that it should have been made in person, and should also have been accompanied by a sworn statement of the operations of the office; that the *revenues* of the office justified the claimant in demanding the sum above mentioned; that a sworn statement of revenue was sent by the claimant on the 1st of January, 1872, and that the Postmaster-General *readjusted* the salary on the 1st of July, 1872, at $560.

The case turns upon the meaning of the statutes of 1854, chap. 61; 1864, chap. 197; and 1866, chap. 114, which at that time provided for the compensation of postmasters.

The first of these acts authorized a compensation by *commissions* ascertained by a sliding scale, whereby the rate was diminished according as the amount upon which the commissions were calculated, *i. e.*, the postage received at the office, became larger. (10 Stat., 298.)

The act of 1864 substituted a fixed *salary* in lieu of commissions, arranging postmasters into five classes, *the fifth of which* (the one here in question) were to receive as salary less than $100. Such salary was to be adjusted by the Postmaster-General according to the average that had for two years before the act been received by such postmaster, and thereafter, at periods of two years, (and in special cases oftener,) it was to be *readjusted*. (13 Stat., 335.)

The act of 1866, section 8, provided "that when the quarterly returns of any postmaster of the third, fourth, or *fifth class* show that the salary allowed is 10 per cent.

less than it would be on the basis of commissions under the act of 1854, fixing compensation, then *the Postmaster-General* shall review and readjust under the provisions of said section." (14 Stat., 60.)

The Court of Claims being divided upon the claimant's right to recover, for the purpose of an appeal concluded as matter of law (1) that when the claimant showed that his salary under the act of 1864 was 10 per cent. less than it would have been under the act of 1854, it became (under the act of 1866) the imperative duty of the Postmaster-General to readjust such salary; but (2) that nevertheless they (the court) could not execute any *discretion* confided by the act of 1854 to the Postmaster-General, and therefore would fix the amount to be recovered at *the minimum compensation* provided in such cases by the statute.

Judgment accordingly for $569.50.

The point of law upon which this recovery is resisted is this: Inasmuch as the United States, by the act of 1866, required an *act by the Postmaster-General* to precede their agreement to pay a *readjusted* salary, in the absence of that *act by him* no suit will lie to recover such salary. If the *act* were *discretionary*, no remedy of any sort lies in the courts; if it were *ministerial*, the only remedy is by suit to compel *its* performance.

In effect, the United States said to the claimant at the time when he entered upon his office: We will pay you for compensation $7 per annum, and at some time hereafter we will pay you the amount of salary for which (under certain statutes) you shall bring a certificate from the Postmaster-General. Under this view a large class of cases show that in the absence of such certifi-

cate no action can be maintained for the money, no matter how plainly due. (Roscoe, N. P., p. 504.) The claimant cannot convert a conditional promise of that sort into one that is unconditional.

It can make no matter whether the Postmaster-General's refusal to act is justifiable or not. The courts have no competency to pass upon that question *collaterally:* it must be brought before them by *mandamus*, if at all.

Courts do not sit to administer the great executive departments of Government. Their exceptional interference therein is by extraordinary remedies, by which at last they do not perform the executive function themselves, *but compel the delinquent officer to perform it.* To compel an executive officer to do his duty may be a judicial act, but it is not, under our form of government, competent for a judicial officer to do such act himself.

I need not say how thoroughly it would derange the whole system of administration if courts were to undertake to pass *directly* upon the propriety of the action of executive officers, in cases where such officers are not parties, and, therefore, are not heard.

It seems to me that if this suit is maintainable it must be upon principles which would authorize a court of justice in its discretion to administer the whole government by a receiver. The claimant virtually asks the court to set aside, to a certain extent, a high executive officer, and, in a matter of public concern, to devise *equivalent* machinery for the specific one set up by the legislature.

I submit that it is a matter of no consequence here whether the Postmaster-General did or did not have a

discretion over the readjustment. There is no side-wind by which, in the absence of his *review and readjustment*, (made either willingly, or by an order of court *ad hoc*,) the claimant can successfully urge this demand upon the Treasury.

S. F. PHILLIPS,
Solicitor-General.

Supreme Court United States.

OCTOBER TERM, 1877.

No. 792.

THE UNITED STATES, APPELLANT,

vs.

J. K. McLEAN, APPELLEE,

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR APPELLEE.

HARVEY SPALDING,
Attorney for Appellee.

Thomas McGill & Co., Printers, Washington, D. C.

A

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 792.

THE UNITED STATES, APPELLANT,

vs.

J. K. McLEAN, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

Argument for Appellee.

THE APPELLEE WAS POSTMASTER AT FLORENCE, KANSAS.

The appellee having been appointed, and having given satisfactory bonds, was commissioned by the Postmaster General "to hold the said office of postmaster, (Florence, Kansas,) with all the powers, privileges, and emoluments to the same belonging." (Request I, p. 5.) He executed the duties of said office from April 14, 1871, to July 1, 1872, and returned to the Post Office Department all the postages collected, amounting to $1,078, and all the rents collected on his own boxes, amounting to $70.20, less $8.48, which the Postmaster General permitted him to retain. (Finding VI, VII, VIII, pp. 3, 4, and request XVIII, p. 7.)

POSTMASTERS MUST DEFRAY POST OFFICE EXPENSES.

To conduct a post office involves the payment of rent, the hire of clerks, the purchase of fuel, lights, and furniture; all

of which expenses are borne by the postmaster at offices of the third, fourth, and fifth classes, and for none of which is the postmaster by law entitled to be paid.

POSTMASTER'S PAY COVERS ALL.

Every postmaster who furnishes heavy bonds, incurs these expenses, and devotes himself personally to the discharge of the onerous, responsible duties of his office, does so relying upon his supposed legal right to receive pay corresponding in amount with the business of his office.

THE POSTMASTER GENERAL ATTEMPTED A VIRTUAL CONFISCATION OF APPELLEE'S SERVICE AND MONEY TO THE USE OF APPELLANTS.

Appellee was required to defray all the expenses of appellant's business, and to serve personally from April 14, 1871, to July 1, 1872; and was not only denied all pay from the resulting revenues, but was required to pay over to appellant $61.72 of his own revenues, derived from his boxes.

He brought suit in the Court of Claims for compensation, and a judgment was entered in his favor for the amount claimed; whereupon an appeal was taken by the United States to this court.

In the prosecution of this appeal, whatever form of statement may be given to appellant's argument, its substance and meaning must be expressed by the affirmation that the money expended by a postmaster to conduct his office in discharge of his bonded obligations, and the revenue derived from his own boxes, belong to the United States; and that for such expenses and revenue, and for his personal services, he is entitled to no compensation whatever. The appellee having had no pay, the judgment of the Court of Claims in his favor for the same must be reversed, if at all, upon the ground that he is not entitled to any pay.

The appellant accepted appellee's service and took the revenues produced by his labor and money, having first commissioned him to "hold" an office, with "emoluments to the same belonging," and having assured him as follows: "YOUR

SALARY CANNOT EXCEED THE AMOUNT TO WHICH THE OFFICE WOULD BE ENTITLED FROM COMMISSIONS AND BOX RENTS UNDER THE FORMER LAW, BUT WILL BE READJUSTED AT THE PROPER TIME BY THE POSTMASTER GENERAL ON THE BASIS OF THE AMOUNT OF BUSINESS DONE." (Finding II, p. 2.)

This promise and assurance is in exact accord with the statutes upon the subject, which from the beginning have prescribed reasonable rates of compensation, made proportionate to and ascertainable and computable in all cases upon the business of the office alone. Some expressions occur in the earlier statutes which, if severed from the context, might be made to convey the power of discretion over the subject to the Postmaster General. But in all cases the context renders such construction impossible. A fair illustration of this is the act of March 3, 1825, (4 Stats. L., p. 102,) the material portions of which read as follows:

"SEC. 14. *And be it further enacted*, That the Postmaster General be, and he is hereby, authorized to allow to each postmaster such commission on the postages by him collected as shall be adequate to his services and expenses; *Provided*, That his commission shall not exceed the following several rates on the amount received in one quarter, viz:

"On a sum not exceeding one hundred dollars, thirty per cent.

"On any sum over and above the first hundred dollars and not exceeding four hundred dollars, twenty-five per cent.

"On any sum over and above the first four hundred and not exceeding two thousand four hundred dollars, twenty per cent.

"On any sum over and above the first two thousand four hundred dollars, eight per cent." * * *

"The Postmaster General may allow to the postmaster at New Orleans at the rate of eight hundred dollars a year in addition TO HIS ORDINARY COMMISSIONS. The Postmaster General is hereby authorized to allow to the postmaster of the city of Washington, IN ADDITION TO THE ALLOWANCE MADE BY THIS ACT, for postage collected and for free letters received by him for delivery, a commission of five per cent. on the amount of mails distributed at his office: *Provided, nevertheless*, That the whole annual emolument of the said postmaster, including the extra compensation of eight hundred dollars which is

hereby allowed him, shall be subject to the restrictions imposed by the forty-first section of this act." * * *

"SEC. 41. *And be it further enacted*, That whenever the annual emoluments of any postmaster, after deducting therefrom the necessary expenditures incident to his office, shall amount to more than two thousand dollars, the surplus shall be accounted for and paid to the Postmaster General, and by him to be accounted for in the same manner as other moneys accruing from the Post Office establishment."

In this statute no effect could be given to the graduated rates of commission specified, except by regarding them as a prescription by limitation of the rates specified; and that this was the intention of the statute is also shown by section 41, and by the words in the context, "in addition to the allowance made by this act." The same construction was put upon it by the "Regulations," which followed. Subsequent statutes and regulations confirmed this construction, as will be seen from the following extracts:

"SEC. 1. *Be it further enacted*, That in lieu of THE COMMISSIONS ALLOWED DEPUTY POSTMASTERS BY THE FOURTEENTH SECTION OF THE ACT OF THE THIRD OF MARCH, EIGHTEEN HUNDRED AND TWENTY-FIVE, the Postmaster General may allow, on the proceeds of their respective offices, a commission not exceeding the following rates on the amount received in any one year, or a due proportion thereof for less than a year."

Sec. 1, act 1st March, 1849, 9 Stat. L., p. 147.

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, THAT THE RATES OF COMMISSIONS AUTHORIZED *to be paid to postmasters by the first section of said act* (above quoted) shall be allowed and paid to them on the amount of postage received in each quarter of the year, and in due proportion for any period less than a quarter, instead of being allowed and paid on the amount received for a year, as was by mistake provided for in said act."

Sec. 1, act 17th May, 1848, 9 Stat. L., p. 230.

"*Emoluments of Postmasters.*

"SEC. 281. The commissions, allowances, and emoluments of postmasters for their compensation and expenses ARE LIMITED BY LAW. (*See act of* 1825, *sec.* 2; *Act of* 1842, *sec.* 2;

Act of March 1, 1847; *Act of March* 3, 1847; *Act of May* 17, 1848, *sec.* 1; *and act of March* 3, 1851. THEY ARE AS FOLLOWS, VIZ:

"1. On the amount of letter postage not exceeding $100 in any one quarter, 40 per cent.

"2. On any sum between $100 and $400 in any one quarter, 33⅓ per cent.

"3. On any sum between $400 and $2,400 in any one quarter, 30 per cent.

"4. On any sum over $2,400 in any one quarter, 12½ per cent."

Part chap. 39, Regulations, 1852.

The act of 22d June, 1854, (10 Stat. L., p. 298,) prescribed rates of commission in language which wholly excludes any discretion on the part of the Postmaster General. The following from the Regulations of 1857 exhibits the rates prescribed:

"CHAPTER XXVIII.

"*Commissions of Postmasters.*

"SEC. 306. Postmasters are entitled, by law, since July 1, 1854, to the following commission on the amount of postages received by them *in each quarter of the year*, AND IN DUE PROPORTION FOR ANY FRACTIONAL PART OF A QUARTER; but no postmaster can receive a larger compensation from commissions than $500 per quarter:

"'On a sum not exceeding $100, sixty per cent.; on a sum over the first, and not exceeding $400, fifty per cent.; on a sum over and above the first $400, and not exceeding $2,400, forty per cent.; on all sums over $2,400, fifteen per cent.;' consequently these rates of commission are—

"60 per cent. on the first $100
"50 " " next 300
"40 " " " 2,000
"15 " on all over 2,400."

This act was repealed by section 327, act 8th June, 1872, (17 Stat. L., p. 326,) and must, therefore, be regarded as in force, and as forming the basis of the salary act of 1864.

BOX RENTS.

As postmasters were required to provide offices, furnish them, and defray the expenses, box rents belonged to the

postmaster, and no accounts were rendered of them till the act of 18th May, 1842, (5 Stat. L., p. 487, No. 202,) was passed, requiring all over 3,000 dollars per year to be paid to the Postmaster General.

This was followed by section 13, act 3d March, 1847, which required that "all receipts from boxes, beyond two thousand dollars" per year, should "be applied in defraying the expenses of their offices." (9 Stat. L., p. 188, sec. 13.) This was also repealed by section 327, act 8th June, 1872. The following regulations, published March 1, 1866, remained in force until superseded by similar regulations on the same subject, published after April 5, 1873:

CHAPTER XLII.

Letter Boxes.

SEC. 473. The Post Office Department neither owns, erects, nor repairs letter boxes in post offices, except where the building is owned by the United States. Letter boxes ARE THE PROPERTY OF THOSE POSTMASTERS WHO CHOOSE TO PUT THEM UP.

SEC. 474. The salaries of postmasters are established upon the basis of ALL THE REVENUES of their post offices during the two years preceding the passage of the law, *i. e.*, 1863 and 1864. Box rents are included in these revenues. Every postmaster receives in the form of salary as much compensation as he formerly received from commissions and box rents.

SEC. 475. Any postmaster may put up boxes in his office. These boxes are his private property, but the revenues thereof must be paid over to the department. Under the system of salaries, the postmaster receives the benefit of those revenues as effectually as he could under the system of commissions and emoluments.

SEC. 476. Where the justice of the case demands, the Postmaster General has authority to readjust salaries oftener than once in two years; and under this provision of law all inaccuracies and inadequate or excessive allowances of salary can be readily corrected; so that, where there is an extraordinary increase or decrease of box rents within the two years, the salary may be readjusted so as to meet the requirements contemplated by the law.

* * * * * * * *

Box rents, up to the limit of $2,000 per year, belonged to the postmaster, and in no case did the same beloug to the United States, unless the postmaster was credited for the same in his salary after the enactment of the salary law act, July 1, 1864. (13 Stat. L., p. 335.)

The statutes referred to show that from them the Postmaster General derived no discretionary power whatever over the pay of postmasters. The rates of pay were prescribed by law, and although the form of the enactment sometimes was, "that the Postmaster General is authorized to allow," yet the next statute construes the one prior to be an allowance BY THE ACT of the rates specified. The "discretion" of the Postmaster General was, therefore, absolutely excluded from the law.

THE SALARY ACT.

The salary act of July 1, 1864, (13 Stat. L., p. 335, secs. 1, 2, 3, 4,) as amended by the act 12th June, 1866, (14 Stat. L., p. 59, sec. 8,) remains to be considered in the light of the preceding acts upon the same subject, which have been briefly considered.

Section 1 of this act required the Postmaster General to ascertain the average amount of commissions and box rents, and assign said amount as salary, "as nearly as practicable in amount the same as, but not exceeding" the said average amount. The said salaries of third-class officers to be "in even hundreds of dollars;" of fourth class, "in even tens of dollars;" and fifth class, "in even dollars."

Section 2 required a reassignment by the same rule once in two years, and, after the addition of the *proviso*, (act June 12, 1866, 14 Stat. L., p. 59, sec. 8,) a reassignment by the same rule of salaries to third, fourth, and fifth-class officers was required as often as the commissions and box rents exceeded the pay ten per centum. This section, as amended, reads as follows:

SEC. 2. *And be it further enacted*, That the Postmaster General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section,

the salary assigned by him to any office; but any change made in such salary shall not take effect until the first day of the quarter next following such order, and all orders made assigning or changing salaries shall be made in writing, and recorded in his journal, and notified to the auditor for the Post Office Department: *Provided*, That WHEN the quarterly returns of any postmaster of the third, fourth, or fifth class, SHOW that the salary allowed is ten per centum less than would be on the basis of commissions under the act of eighteen hundred and fifty-four, fixing compensation, THEN the Postmaster General SHALL review and readjust under the provisions of said section.

Without the *proviso* of section 2, the salary act of July 1, 1864, prescribed no rule to govern the Postmaster General, as to *time* of readjustments of salaries, except that he was required to make the same "once in two years" The mode of readjustment was prescribed by law, and the time "once in two years," was also prescribed. The Postmaster General might also, at his election, make readjustments, by the mode prescribed, "as much oftener as he may deem expedient." Thus, for about two years, there was no statutory rule as to time of readjustments of salaries between periods of two years.

It was the sole function of the *proviso* of section 2, enacted 12th June, 1866, to supply this rule. It has no purpose, if it has not this purpose, and it has no effect, unless to make it "the imperative duty of the Postmaster General to review and readjust" salaries "in the cases therein enumerated," "WHEN the quarterly returns" "show that the salary allowed" is ten per centum less than it would be on the basis of commission, allowed to postmasters, under *act 22d June*, 1854.

No language can be clearer or more emphatic, than the language of the proviso: "WHEN the quarterly returns * SHOW, * THEN the Postmaster General SHALL review and readjust." *

As to "the cases therein enumerated," all discretion theretofore resting with the Postmaster General, is absolutely removed by these enacting words, and an "imperative duty" was thereby imposed on the Postmaster General, and the rights of post-

masters, coming within the rule, were thereby vested, and these rights, under the statute, were measured and determined solely by the "quarterly returns;" and the manner, times and forms of the "quarterly returns," were prescribed by the Postmaster General, in regulations, published by his authority.

As this proviso can have effect only as stated in the conclusion of law, of the court below, there would seem to be no ground upon which to ask a reversal of their judgment.

Section one, of the salary law, prescribes the mode of adjustment of salaries of post offices, established two years before July 1, 1864, and section 2 prescribes the times of readjustment, and requires changes in salaries to take effect from the first day of the quarter next following the change. The post office at Florence, Kansas, having been established in 1871, falls within the rule of *adjustment* prescribed by section 4, and the court below did not consider or determine, as appears, the proper construction of this section.

The act of June 22, 1854, not having been repealed till June 8, 1872, it would seem to be clear that the pay of all postmasters must be determined by that act up to the precise time that the Postmaster General caused to take effect a *salary* adjusted under section 1 or 4 of the salary act.

In the present case, he did not cause a salary adjusted under any act to take effect at this office, although the law made it his duty to do so. The argument in this case necessarily proceeds upon what *would have been*, had the Postmaster General executed the salary-law; this upon the theory, that the Postmaster General having failed to execute the law, the court may do so. If the court may not execute this law, it follows that the prior acts not repealed must be executed. Assuming that the court may execute the law of July 1, 1864, it is necessary to inquire as to the proper construction of section 4.

The first point to be considered is: That by this section, Congress did not intend to reverse the policy shown in all prior acts, and clothe the Postmaster General with power to *reduce* the pay to varying rates or to nominal rates. Neither

was it intended by this section to incorporate an entirely different rule as to offices not then established from that prescribed as to older offices. The language of this section must have the same effect as was given to similar language in prior acts, both by Congress and the Executive. Following this settled rule, the rate specified is a rate prescribed by limitation.

The next point is: To what period is the "adjustment" prescribed in said section limited? The answer to this is clear, and is to be found in the statute itself. The adjustment is to be made "upon satisfactory return," and to be limited to "*fifty per centum of the gross revenue.*" This is an adjustment upon a return, and is limited to an allowance, *out of the revenue* returned, to fifty per centum thereof. The limit specified could only be applied to an *ascertained* revenue, and the adjustment provided for is confined to the first return, and to the business shown by that return. The commissions and box rents shown by this return, under the act of 12th June, 1866, measures the future pay, while the limitation imposed by said section 4, measures the pay on the first return.

It would seem proper to consider still another statute in this case, namely, section 83, and the proviso of section 84 of the act of 8th June, 1872. (17 Stat., p. 295.)

Findings IX and X show that a computation of the salary of this office was made upon returns of revenue thereof from July 1, 1871, to January 1, 1872, and a salary of $560 per year was assigned thereon from July 1, 1872. It is submitted that under the proviso of section 84, the claimant was entitled to a salary of $560, from July 1, 1871, to July 1, 1872, in lieu of the allowance of $7 made.

An examination of the statutes shows that the following modes of computing the pay of appellee are prescribed by statute, and that no other mode is authorized or prescribed by law:

First. A computation upon all the returns, under the act of June 22, 1854, by which the claimant was entitled to all the

box-rents and commissions, as prescribed, on all the other revenues.

Second. An adjustment of salary on the first return, (Finding VI,) equal to fifty per centum of the revenue of such return, and a readjustment for the period next following, whereby the appellee should receive a sum, as nearly as practicable, the same as, but not exceeding the commissions on the prior return, in even tens of dollars per annum, and a like readjustment on the increased subsequent returns, (Finding VII,) whereby the salary from January 1, 1872, shall be made to conform to the revenues from July 1, 1871, to January 1, 1872.

Third. A salary equal to fifty per centum of the gross revenues on the first return, and a readjustment, under the proviso of section 84, act 8th June, 1872, to take effect July 1, 1871.

The following are the results produced by these methods:

FIRST METHOD.

Box-rents, (Act 3d March, 1847, sec. 13, 9 Stat. L., p. 188).....	$70 20
Commissions on $1,078, other revenues, (Act 22d June, 1854, 10 Stat. L., p. 298).....	587 30
	$657 50
Less amount allowed.....	8 48
Balance due.....	$649 02

SECOND METHOD.

Salary from April 14, 1871, to June 30, 1871, being fifty per centum of revenue on first return, calculated in even tens of dollars per annum, (Act 1st July, 1864, 13 Stat. L., p. 335, sec. 4).....	$80 50

Salary 3d and 4th quarters, 1871, being the amount of commissions, per full quarter, as shown by the preceding return, in even tens of dollars per annum, (Act 12th June, 1866, 14 Stat. L., p. 59, sec. 8).....	210 00
Salary 1st and 2d quarters, 1872, being equal to the commissions and box-rents of the 3d and 4th quarters of 1871, in even tens of dollars per annum, (Act 12th June, 1866, 14 Stat. L., p. 59, sec. 8).....	280 00
	$570 50
Less amount allowed.....	8 48
Balance due.....	$562 02

THIRD METHOD.

Salary from April 14, 1871. to June 30, 1871, being fifty per centum of revenue on first return, calculated in even tens of dollars per annum, (Act 1st July, 1864, 13 Stat. L., p. 335, sec. 4,).....	$80 50
Salary from July 1, 1871, to July 1, 1872, (Act 8th June, 1872, 17 Stat. L., p. 295, sec. 84).....	560 00
	640 50
Less amount allowed.....	8 48
Balance due	$632 02

FINDING XII.

The appellee, although the law constituted his returns the sole criterion as to when a readjustment of salary should be made, and in the entire absence of all regulations upon the subject, made special communications to the Department upon the subject, one personally on the 18th September, 1871, and others by attorney, one of which was on the 14th October, 1872.

The Postmaster General took no action upon these communications, except to communicate, orally, to the attorney his determination not to allow the claimant any other pay than the $8.48 which he had retained out of the $70.20 of box rents, and his belief that his said refusal rendered appellee powerless to enforce his claim.

After April 5, 1873, the Postmaster General published Regulations, section 200 of which is quoted in Request IX. On the 1st of January, 1874, he obtained from the law officer of the Department an opinion, the substance of which was, that a postmaster had no right to employ an attorney to aid him to secure the salary guaranteed by law. On the 16th September, 1873, a call was made by the court upon the Postmaster General for copies of papers and transcripts of record.

On the 9th June, 1874, the Postmaster General, in reply to this call, transmitted a letter to the Court of Claims containing a statement, the substance of which is embodied in this finding. The Postmaster General, however, specified the Regulation claimed to have been disregarded as the "two hundredth regulation of this Department," the one quoted in Request IX.

If it was competent for the Court of Claims to find as facts a statement thus communicated by the Postmaster General, it seemed right and proper that ALL the facts upon which such statement was based, should also appear, and this seemed to require a number of requests which otherwise would have been unnecessary.

Reply to Appellant's Points.

The argument of the Solicitor General, for the appellants, assumes that the right of postmasters to pay depends on the acts of the Postmaster General, and not on the statutes. This argument is equivalent to the proposition that the statutes entitle postmasters to no pay for their expenses, services, and for the rents of their own property.

But it is suggested that a right to pay may be *acquired* by writ

of *mandamus* to compel the Postmaster General to act, whereupon suit may be instituted for the pay, based, not on the statutes, but upon his enforced action, and it would seem to be supposed that the acquisition of a right by writ of *mandamus*, directed to the head of an executive department, as a preliminary proceeding, and a subsequent suit for debt based on the enforced action of such officer, would relieve the great executive departments of the Government from the derangement and interference incident to a suit for debt alone.

The use and functions of the writ of *mandamus* here suggested seem to be new, and in conflict with the decisions of the courts upon the subject.

"*Mandamus* will always be denied when there is other adequate remedy."

"If there be a right and no other specific remedy, this should not be denied."

It is "supplementary remedy when the party has, a clear right, and no other appropriate redress in order to prevent a failure of justice."

"It is the absence of a specific legal remedy which gives the court jurisdiction."

Such is the law, and it is deemed unnecessary to incumber this brief with citations upon settled points of law.

If appellee had a right to an adjustment and readjustment of his salary, it is a right—a claim founded on a law of Congress, and the same is expressly included in the jurisdiction of the Court of Claims, (R. S., sec. 1059,) and thus having other appropriate means of redress, it would seem that he is not entitled to the remedy of *mandamus*.

It is interesting to note that the reason assigned by the courts for restricting the use of the writ of *mandamus* is substantially the same as now assigned by the Solicitor General as one of the reasons for its use in this case, namely, to relieve the executive departments of the Government from derangement and interference.

It is difficult to understand how the departments can be deranged by abstaining from interfering with them and resorting to the court provided by law for that purpose, in cases of denial of rights by executive officers.

If the argument of the Solicitor General extends so far as to claim that the acts of the Postmaster General, the performance of which was by law assigned to him as a duty, to be conditions precedent to the appellee's right to recover, the reply is that a party cannot set up his own failure to perform a condition as a bar to the adverse party. The Postmaster General was the agent of appellant to compute and certify appellee's credits, and it would be a strange doctrine to assert that the debtor may interpose a bar to the creditor's recovery, by refusing to compute and certify the amount of his own debt, or that *mandamus* will lie to compel the debtor to compute and certify to his own indebtedness.

Besides the errors noticed, it is to be observed that the argument for the ~~defendant~~ is fundamentally bad.

The pay of postmasters depends on statutes, and not on the acts of the Postmaster General.

The statutes cited in the "first method" of computation of appellee's pay, without question, vested, unconditionally, his right to the prescribed pay. These acts stood on the statute books unrepealed till June 8, 1872. There could be no increase or decrease of the rates of pay therein prescribed, except by acts of the Postmaster General, in the execution of the salary law.

The Postmaster General took no action whatever under the salary law with reference to appellee's pay for the term sued for, and it follows that, if the court may not execute the salary law, as appears to be claimed by the Solicitor General, the appellee is entitled to recover the amount stated in the "first method" of computation.

The case presented is for a sum due under certain statutes, for services rendered, which has not been paid, for the reason

that the officer designated by law to perform that duty failed and refused to compute and certify the amount due, and the issues do not extend to an inquiry as to the reasons that officer had for refusing to act in the premises, and, if they did, he has had full opportunity to answer, and has answered.

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